

02-11309 SMITH v. DRETKE

Ruling below: CA 5, 311 F.3d 661

QUESTIONS PRESENTED

I. Did the Court of Appeals misapply *Penry v. Johnson*, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a "uniquely severe permanent handicap" in order for a Texas capital murder defendant to claim that a "nullification" instruction was improper?

~~II. Did the Court of Appeals err by finding that the Petitioner did not demonstrate ineffective assistance of counsel sufficiently to show that the state habeas finding was unreasonable?~~

~~III. Did the Court of Appeals err by relying on the erroneous waiver doctrine of *Fierro v. Lynaugh*, 879 F.2d 1276 (5th Cir. 1989), cert. denied 494 U.S. 1060 (1989) and a legally erroneous state court finding?~~

CERT. GRANTED: 9/30/03

Limited to Question 1 presented by the petition.